court in several cases arising from such occupation during the late war with Mexico. In the case of *Leitensdorfer* v. *Webb*, 20 How., 176, the authority of the officer holding possession for the United States, to establish a provisional government was sustained; and the reasons by which that judgment was supported, apply directly to the establishment of the Provisional Court in Louisiana. The cases of *Jecker* v. *Montgomery*, 13 How., 498; 18 How., 110; *Cross* v. *Harrison*, 16 How., 164; *United States* v. *Rice*, 4 Wheat., 216, and *Texas* v. *White*, 7 Wall, 700, may also be cited in illustration of the principles applicable to military occupation.

We have no doubt that the Provisional Court of Louisiana was properly established by the President in the exercise of his constitutional authority during the war, or that Congress had power, upon the close of the war and the dissolution of the Provisional Court, to provide for the transfer of cases pending in that court, and of its judgments and decrees, to the proper courts of the United States. The case, therefore, being properly here, we will proceed to dispose of it.[1] * * *

For a more elaborate consideration of the principles and authorities on which the right and duty of a power, holding in military occupation hostile territory, to govern the same and administer justice therein depends, we refer our readers to the opinion of Judge PEABODY, in *United States* v. *Reiter*, 4 Am. Law Register, N. S., 434.

For an account of the U. S. Provisional Court of Louisiana, we refer readers to 4 Am. Law Register, N. S., 65.

For a more complete account of the Provisional Judiciary of Louisiana during the occupation by the Federal forces, we refer also, to 4 Am. Law Reg. N. S., 257

Circuit Court of the United States, Southern District of New York.

THE UNITED STATES *v.* THE JUDGES OF THE SUPERIOR COURT OF THE CITY OF NEW YORK.

The power of the Circuit Court of the United States to issue a writ of *Prohibition* to another court is confined to cases where the issuing of such a writ is necessary for the exercise of its own jurisdiction, and is agreeable to the principles and usage of law.

---

[1] The rest of the opinion is not of general interest.—Ed. A. L. R.

Where an adjudication of bankruptcy of a partnership firm is made by the District Court, and is brought into the Circuit Court for review under Section 2 of the Bankrupt Act, the jurisdiction of the Circuit Court is revisory only, and does not extend beyond a review of questions presented to the District Court. Any orders or proceedings to carry into execution the orders or decrees of the District Court, must be made by that court.

Therefore, a suit by one of the bankrupt partners against the other, in a state court, seeking an account, and the appointment of a receiver, is not such an interference with the jurisdiction of the Circuit Court as would authorize it to issue a writ of prohibition.

Whether in any case the Circuit Court has power to issue a writ of prohibition to a state Court, *dubitatur*.

THIS was a petition by Abraham Bininger and others, who were creditors of said Bininger and A. B. Clark, trading as Bininger & Co., for a writ of prohibition to the Superior Court of New York. The petition showed that the said firm of Bininger & Co. had been adjudicated bankrupt by the District Court of the United States for this district, upon creditors' petition, and the said Clark was now prosecuting in this court, in pursuance of the second section of the bankrupt law, a proceeding for the review of that adjudication; that prior to the institution of the proceedings in bankruptcy in the District Court, the said Clark had filed his bill in the Superior Court of the City of New York against his partner, Bininger, for an accounting and for the settlement of the affairs of the copartnership, the payment of the debts and the distribution of the assets, and therein a receiver had been appointed, who was, or claimed to be, in the possession of the property of the firm; that after the proceedings in bankruptcy were instituted, the said Clark commenced successively two actions in the said Court, and procured from that tribunal injunctions restraining the petitioning creditors from prosecuting the said proceedings.

Bangs, for the petitioners.

Roger A. Pryor, for the respondents.—There is no authority to issue a writ of prohibition to a state court. No such writ has ever issued. Even conceding the authority this is not a case for its exercise. It is not necessary for the protection of the jurisdiction of this court: *McIntire* v. *Wood*, 7 Cranch,

504; *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Cristy*, 3 How., 292. Nor is the court acting without or in excess of jurisdiction: *Ex parte Tucker*, 1 M. & Gr., 519; *Mayor* v. *Cox*, L. R. 2 H. L., 239; *Tinniswood* v. *Patterson*, 3 C. B., 243; *Illey* v. *Harvey*, 5 D. & L., 648; *Marsden* v. *Wardle*, 3 E. & B., 695; *Thompson* v. *Ingham*, 14 Q. B., 710; *re Bowen*, 21 L. J., Q. B., 10; *Earl of Huntington* v. *Ramsey*, 8 Exch., 879; *Mossop* v. *Great Northern R. R. Co.*, 17 C. B., 130; *Norris* v. *Carrington*, 16 C. B., N. S., 996.

The writ of prohibition, as known to the Federal judiciary, is in the nature of appellate process; and will go to no court over which the tribunal awarding it has not appellate jurisdiction: MARSHALL, C. J., in *Cohens* v. *State of Virginia*, 6 Wheaton, 392; *Marbury* v. *Madison*, 1 Cranch, 137; 1 Curtis' Comm., sec. 198; *U. S.* v. *Peters*, 3 Dall., 121; *Ex parte Gordon*, 1 Black, R., 503; Conklin's Treatise, 67–8. In no event, and under no circumstances, are the proceedings and judgments of a state court amenable to the supervision of the United States Circuit Courts: Act of 1789, section 2 and 22; Act of March 3, 1803. The state court is not an *inferior* court. It is a foreign court of independent jurisdiction.

WOODRUFF, Circuit J. The petition gives with much detail, facts and circumstances tending show that the purpose and effect of the prosecution of the several writs in the Superior Court, and motions therein to enforce obedience to the injunctions, is to defeat the operation of the adjudication of the District Court and hinder or obstruct the administration of the property of the bankrupts by the District Court under the bankrupt law of the United States, and it is thereupon prayed, that this court will, pursuant to the fourteenth section of the Act of the Congress of the United States, passed September 4, 1789, entitled "An Act to Establish the Judicial Courts of the United States," issue a writ of prohibition addressed to the said Superior Court and the judges thereof, prohibiting the said court and the said judges from further entertaining the said actions or from entertaining any other or further proceedings on the petition, application or at the suit of the said Clark for the purpose of interfering with the said adjudication and

jurisdiction of the said District Court, or from interfering with or nullifying the effect of the jurisdiction of this court under the Act of Congress.

It is not suggested that this court has power to issue the writ prayed for unless the authority is conferred by or is implied from some express statute, and both in the petition and in the brief submitted by the counsel for the petitioners, such power is sought to be derived from the fourteenth section of the Act of Congress of 1789, commonly known as "the Judiciary Act." That section provides that all of the courts of the United States in the act before mentioned, including the Circuit Court, "shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law:" 1 Stat., 81: In *ex parte Christy,* 3 How., 292, the Supreme Court of the United States, referring to this section and to Section 13, which gives express power to that court to issue writs of prohibition to the District Courts when proceeding as Courts of Admiralty and Maritime jurisdiction, by the opinion of Mr. Justice STORY, disclaimed any general authority to issue a writ of prohibition to the District Court in cases in bankruptcy, over whose orders and decrees in such cases the Supreme Court possessed no revising power, however the District Court exceeded its jurisdiction. And the ground stated is, that the District Court, by such orders and decrees, did not interfere with, evade, or obstruct any appellate authority of the Supreme Court. Without, therefore, pausing to inquire whether, under the said fourteenth section, this court has power, and if so, in what cases, to issue a writ of prohibition to a state court, it is clear that, if the power exist, the limitation is explicit which confines that power to cases wherein such writ is "necessary for the exercise of the jurisdiction of this court;" and since the power is not claimed to exist under any grant of general jurisdiction, or to have been conferred by any other statute, the test of the power to issue the writ now applied for lies in the inquiry whether, in the case made by the petition, such writ is necessary for the exercise of any

jurisdiction now vested in the Circuit Court in the matter in litigation, and is agreeable to the principles and usages of law. What, then, is the jurisdiction which this court has over the proceedings set forth in the petition? First—by a petition of review, Clark, the plaintiff in the actions in the Superior Court, has sought in this court a review of the decree of the District Court, wherein he is adjudged a bankrupt, and, for the purposes of that review, this court has acquired jurisdiction of those proceedings. But the exercise of that jurisdiction is in no wise obstructed or interfered with by the actions prosecuted by him in the Superior Court. He may pursue that appeal to the revisory power of this court, and the respondents therein may here insist upon the correctness of the decree of the District Court, and this court will proceed to hear and reverse or affirm that decree, entirely unaffected by the pendency or the prosecution of those actions, and the action of this court in the matter of that review terminates with such affirmance or reversal. If such decree is affirmed, the decree of the District Court stands as the decree of that court and not of this, and to be carried into due execution by that and not this court. Second—The argument of the counsel for the petitioners involves the assumption that, by force of the second section of the Act of Congress, commonly called the bankrupt law, this court possesses, concurrently with the District Court, all the powers conferred by the first section upon the last-named court, and, therefore, whatever impedes the execution of the decrees of the District Court, or obstructs or interferes with the administration of the estate of the bankrupts by that court, warrants the petitioners in insisting that the exercise of the jurisdiction of this court is obstructed or hindered, and in claiming in this court that the writ of prohibition is necessary. In the first place this overlooks the familiar doctrine that, where the jurisdiction of two courts is concurrent, the one which first obtains jurisdiction of the subject matter and of the parties by the actual institution of proceedings therein, holds such jurisdiction exclusively of the other. But in the next place, the Act of Congress does not so blend or confound the two courts in the administration of the

bankrupt law. The courts are distinct under that act, as under all others, and exercise a separate jurisdiction, each in its own sphere. This is not supposed to be doubtful in respect to the appellate jurisdiction, conferred on the Circuit Court by the eighth or twenty-fourth section of the act, to review, by appeal or writ of error, the proceedings of the District Court, nor in respect to actions at law or in equity, whereof the two courts are declared to have concurrent jurisdiction, as, for example, actions brought by or against the assignee in bankruptcy, as provided in the second section. Nor is it at all to be suggested that proceedings in bankruptcy can be initiated in this court. For that purpose the jurisdiction of the District Court is plainly exclusive. The provisions of the second section relied upon are those which declare that "the several Circuit Courts within and for the districts where the proceedings in bankruptcy shall be pending shall have a general superintendence and jurisdiction of all cases and questions arising under this act, and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a Court of Equity." The claim that the prohibition prayed for in the petition herein is necessary to the exercise of the jurisdiction of this court, in the matter of the bankruptcy of Clark and Bininger, can only rest upon the ground that by force of the language above cited, it is competent for the parties to come into this court and seek original orders and decrees in the due and ordinary course of such proceedings, either to facilitate the completion thereof or to carry them into effect; that the proceedings having been duly instituted, the parties have an option to apply to either court to expedite or consummate the same; and in short, that so soon as such proceedings have been begun they may be continued in either Court, or partly in one and partly in the other. And yet, when this claim is thus broadly stated, no counsel will, I think, seriously insist that the section warrants so unprecedented and extraordinary a confusion of jurisdiction. Nevertheless, to insist that this court has jurisdiction in the proceedings themselves to make orders in specific execution or enforcement of the decrees

or orders of the District Court, involves all that is above suggested. The superintendence and jurisdiction conferred in that clause of the second section are revisory of cases and questions arising in the District Court, and contemplate a review of what is presented to that court for consideration and decision. They may include the power which in a special and perhaps more restricted form was given in the sixth section of the Bankrupt Act of 1841, wherein authority was given to adjourn any point or question arising in any case in bankruptcy into the Circuit Court, to be there heard and determined; and it may be that under the present act the presentation of such questions, and the jurisdiction of this court over them, does not, as in the former, depend upon the discretion of the District Court, as to which it is not necessary to express an opinion; but in either view the questions, or cases presenting such questions, must arise in the District Court, and their determination in this court is either for the guidance or control of the District Court. This is not a jurisdiction to assume the conduct of the proceedings or to specially enforce or execute the orders or decrees of that court. For that purpose the District Court has ample and exclusive power. This jurisdiction which is given for revisory and perhaps advisory purposes to the Circuit Court, it can exercise, notwithstanding the pendency and the prosecution of the actions mentioned in the petition herein. The exercise of that jurisdiction is not obstructed by anything shown by the petition. The jurisdiction of this court in the case in question, so far as shown by the petition for the writ of prohibition, arises on a petition for a review of the adjudication, made in the District Court declaring Bininger & Clark bankrupts. There is no impediment to the exercise of that jurisdiction. The alleged proceedings in the state court in nowise interfere therewith. A prohibition of such action in the state court, as is set out in the petition, is not necessary for the exercise of any jurisdiction in the matter of the bankruptcy of Bininger & Clark which the Circuit Court has acquired. This court can review, in the manner and for all the purposes contemplated by the second section of the act, the orders, decisions and decrees already made or which may be made in the District Court. Such

review cannot be rendered inoperative or ineffectual by any action of the state court. It belongs to the District Court, and not to this, to carry into execution its orders and decrees. If, therefore, it be assumed that a state court stands in such a relation to the Federal court, that "agreeably to the principles and usages of law," a writ of prohibition could be issued by the latter to the former, the petition before us does not present a case in which such writ is necessary to the exercise of our jurisdiction.

I have preferred to place the opinion upon the grounds above stated, not only because these questions of the construction of the second section are of immediate practical importance, but also because they are directly involved in and are decisive of other motions pending before us in the same proceedings in bankruptcy mentioned in the petition.

The motion must be denied.

Superior Court of New York.

ABRAHAM B. CLARK, *v.* ABRAHAM BININGER.

Where the jurisdiction of a state court has attached, as *e. g.* in a bill for an account between partners, and property has passed into the hands of a receiver under its order, the jurisdiction is not disturbed by a subsequent adjudication of bankruptcy of the parties, and the title of the receiver is superior to that of the assignee in bankruptcy.

The Bankrupt Act does not authorize the courts of bankruptcy to enjoin a state court even in the matter of the distribution of the assets of an insolvent partnership, nor does it declare them the only courts in which such distribution can be made.

On November 19, 1869, the plaintiff, Clark, brought an action in this court, in the nature of a bill in equity, for an account in partnership and an adjustment and distribution of the assets. On the same day a receiver was appointed, who took immediate possession of the property, which he still held, pending the action. On December 11, 1869, proceedings in bankruptcy were commenced in the United States District Court, for Southern District of New York, against the partner-